Supreme Court, U.S.
FILED
APR 1 1992
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91-1584

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

versus

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Robert Blanke
Counsel of Record
12015 Manchester Road
Des Peres, Missouri
63124
(314) 822-8552

Steven Z. Routburg
12300 Olive Boulevard
Suite 310
Creve Coeur, Missouri
63141
(314) 469-0800

Attorneys for Petitioners

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
ALBERT RIMELL,	)	Case No. 89-04383-BSS
HARRIET RIMELL,	)	Case No. 89-04382-BSS
MORRIS SHERMAN,	)	Case No. 89-04385-BSS
ROSALYN MARGULIS,	)	Case No. 89-04386-BSS
Lawrence Margulis,	)	Case No. 89-04387-BSS
	)	
Alleged Debtors	)	Entered February 5, 1990

MEMORANDUM OPINION AND ORDER

INTRODUCTION

On October 18, 1989, petitioners, Mark Twain Bank (hereinafter "Mark Twain") and First Bank filed, pursuant to 11 U.S.C. section 303(b) (2), an involuntary Chapter 7 petition against Alleged Debtor Harriet Rimell. This filing was one of a series of actions in which Mark Twain and First Bank, in addition to The Boatmen's National Bank of St. Louis (hereinafter "Boatmen's), and Mercantile Bank of St. Louis National Association f/k/a Mercantile Bank National Association (hereinafter "Mercantile" and collectively as "the Creditors"), filed involuntary Chapter 7

petitions against Albert Rimell, Morris Sherman, Rosalyn Margulis, and Lawrence Margulis, pursuant to 11 U.S.C. section 303(b) (1). Harriet Rimell asserts that she has more than eleven creditors, and since section 303(b) (2) permits two petitioning creditors to prevail only when a debtor has fewer than eleven creditors, the petition must be denied.

While Harriet Rimell's case shares defenses common to the other four debtors listed above, the issue of whether sufficient creditors exist to avoid her being placed in an involuntary Chapter 7 bankruptcy is unique to her case. Thus, this opinion will be divided into two main sections-- Ms. Rimell's section 303(b) (2) counting of creditors, and the overriding involuntary case involving all five defendants.

JURISDICTION

This Court has jurisdiction over the subject matter of the proceeding pursuant to 28 U.S.C. sections 151, 157, 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" which the Court may hear and determine pursuant to 28 U.S.C. section 157(2) (O).

I.

Ms. Rimell's section 303(b) (2) Creditor Counting

FACTS

In her answer, Harriet Rimell listed seventeen (17) creditors of her estate. Late in the afternoon of the day before this case went to trail, counsel for Ms. Rimell filed an amendment to this list (as required by Rule 1003(b) which enumerated four additional creditors. At the commencement of the trial, this Court denied Ms. Rimell's Motion to

Amend Pleadings as untimely and prejudicial to the rights of the petitioning creditors to seek discovery and joinder of such creditors. Between December 18 and January 3, 1990 (the date of resumption of the December 18, 1989 trial), this Court permitted Ms. Rimell to add five creditors to those already claimed in her answer. However, this Court denied her attempted addition during the continued trial of the St. Louis County Collector as a twenty-third creditor. Thus, Ms. Rimell has listed a total of twenty-two creditors which this Court must consider in determining whether the Plaintiffs have met their burden.

At trial, Harriet Rimell testified that in January or February, 1989 she and her husband, Albert Rimell, created the Rimell Family Trust (hereinafter the "Trust") to pay all bills related to expenses and maintenance of the Rimell's pleadings were paid directly from the Trust, whose sole source of funds,

Ms. Rimell testified, was her regularly-contributed paychecks. Ms. Rimell also testified that the Trust was created solely "for estate planning purposes".

Ms. Rimell has listed creditors of both herself and the Trust. Thus, in order to determine the number of creditors she has for purposes of section 303(b) (2), this portion of the Opinion will be divided into two sections-- creditors of Ms. Rimell personally, and creditors of the Trust.

A. Creditors of Ms. Rimell

1. Sears, Roebuck and Company

Ms. Rimell listed Sears, Roebuck and Company (hereinafter "Sears") as holding a $426.92 claim for merchandise purchased. In 1962, Mr. Rimell opened a Sears account under the name of "Albert Rimell", with Harriet Rimell as an authorized signatory. Thus, while Harriet Rimell was capable of purchasing merchandise under this account, at

no time has Sears held her personally liable for any debt incurred.

Section 101(4) of the Bankruptcy Code defines a "claim" as a "right to payment". In order for the creditor to have a right to payment, the debtor must be personally liable. Although Teresa Nadolski, a bankruptcy representative from Sears, testified that the company may choose to "go after" Ms. Rimell if her husband was unable to pay his bill, this Court was not presented with evidence sufficient to allow a conclusion that Ms. Rimell was personally liable. Given the absence of Ms. Rimell's personal liability, this Court concludes that Sears does not have a claim against Ms. Rimell and thus may not be counted as a creditor for purposed of section 303(b) (2) of the Bankruptcy Code.

2. Pioneer Bank

Pioneer Bank's involvement with the Rimells arose from a $1,225,846.61 commercial loan which it made to Albert Rimell, Inc. On February 17, 1988, Harriet Rimell executed a personal guaranty of the indebtedness. Under the terms of the guaranty, Pioneer reserved the right, whenever the loan came due, to require Ms. Rimell to pay the amount due on demand. At trial Jean Marcus, Pioneer's Vice President of Real Estate Lending, testified that although the loan was past due as of the filing date, Pioneer had not demanded payment of the loan pursuant to her personal guaranty. Thus, as of the filing date Pioneer Bank held a contingent claim against Ms. Rimell and this Court will count the Pioneer Bank as a creditor for purposes of section 303(b) (2).

3. R.B. Platt Development Co.

R.B. Platt Development Company (hereinafter "Platt") holds a claim of

$659.43 for installation of windows in the Rimell family home. On January 3, 1990, Max Platzelman, president of Platt, testified that his workmen installed the windows sometime in October, but was unable to find an exact date. The only existing written evidence of indebtedness was a letter dated December 14, 1989, in which Albert Rimell requested a bill from Platt, and a November 26, 1989 invoice from Platt.

Although Mr. Platzelman's testimony fails to conclusively prove that Platt had a claim against Ms. Rimell on the date of her filing, this Court believes that Ms. Rimell's testimony is dispositive in determining whether such a claim did exist before October 18, 1989. At trial Ms. Rimell stated that sometime in July she requested that Platt perform the work Platt agreed to this arrangement. Therefore in July 1989 a contract existed between Platt and Ms. Rimell

for which Ms. Rimell was personally liable. Given this liability, this Court holds that, for purposes of section 303(b) of the Bankruptcy Code, a party becomes a creditor at the time a debt is incurred, as in the instant case when an enforceable contract was formed.

4. St. Louis County Farm Bureau

Ms. Rimell listed a claim of $87.48, which she owed to St. Louis County Farm Bureau for an insurance premium. However, Ms. Rimell testified that (on August 25, 1989) she made a prepayment of that amount for health insurance coverage for the months of September, October, and November. Thus, Ms. Rimell owed nothing to this creditor on October 18, 1989, and St. Louis County Farm Bureau is excluded as Ms. Rimell's creditor for purposes of section 303(b) (2).

5. Southwestern Bell Telephone Company

Ms. Rimell listed Southwestern Bell Telephone Company (hereinafter "Southwestern Bell") as holding a claim for $59.84. Much like Sears, the Southwestern Bell account was maintained only in the name of "Albert Rimell". While Ms. Rimell may have written checks in payment of the Rimells' Southwestern Bell bills from family funds, her status was basically the same as in the case of the Sears charge account-- only an authorized user. Thus, under the same rationale, this Court holds that an authorized user of services does not place one in personal liability to a provider of such services. Accordingly, Southwestern Bell is not included as a creditor.

6. D & L Plumbing, Inc.

On October 4, 1989, D & L Plumbing, Inc. (hereinafter "D & L") performed work in the Rimell's home for which it charged $50. However, due to its own business relocation,

it failed to bill the Rimells until December 14, 1989, when Mr. Rimell insisted that D & L send them a bill. The petitioning Creditors claim that Mr. Rimell made this demand for a bill was made on the eve of trial solely for purposes of avoiding the entry of relief against Harriet Rimell. Therefore the Creditors argue that D & L should be excluded from Ms. Rimell's creditor count.

Sometime prior to October 4, 1989, Ms. Rimell requested by telephone that D & L perform work at the Rimell residence. Thus, on that date a contract was formed, and consequently a debt was incurred at that time. Thus, it follows that on October 18, 1989 the Rimells were indebted to D & L. The company's failure to send a bill until December 14, 1989, and then only upon the debtor's insistence, is of little consequence. The fact remains that D & L held an enforceable claim against Ms. Rimell

before the date of the filing, and thus D & L shall be counted as a section 303(b) (2) creditor.

7-11. Ms. Rimell's Attorneys

Counsel has represented Harriet Rimell both in this and other legal matters. In the instant case, Ms. Rimell is represented by Eugene Portman and Gerald A. Rimmel. In the past Ms. Rimell sought the advice and expertise of Messrs. Julius Berg, David Freyman, and Arthur Slonim, all of whom are attorneys and have ceased their legal representation in any pending matters. The petitioning Creditors argue that this Court should exclude all five of the attorneys from the creditor count as "insiders", as prohibited by section 303(b) (2).

While section 303(b) (2) excludes the counting of insiders as creditors in an involuntary proceeding, the Court has found no cases which adequately define the term in

this limited context, nor have the parties cited any such authority. Section 101 (30) of the Bankruptcy Code defines "insider", in pertinent part, as follows:

> (A) if the debtor is an individual--
> (i) relative of the debtor or of a general partner of the debtor;
> (ii) partnership in which the debtor is a general partner;
> (iii) general partner of the debtor; or
> (iv) corporation of which the debtor is a director, officer, or person in control;

Additionally, the legislative history of section 101(30) is instructive. Congress has stated that an 'insider" may be described as a person or entity with a "sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor". S. Rep. No. 95-989, 95th Cong., 2d Sess.,

reprinted in 1978 U.S. Code Cong. & Admin. News, pp. 5787, 5810.

Both the statute and its legislative history indicate that an insider may be someone who currently enjoys a fiduciary relationship with the debtor. This Court concludes that this definition is not limited and should be applied flexibly, on a case by case basis. Certainly an attorney, who invariably acquires confidential client information and whose relationship is governed by rules of professional conduct, may come under this categorization. This Court holds that the definition of "insider" provided in section 101(30) shall include an attorney who is owed money from a client who is currently defending the client in an involuntary bankruptcy petition. Applying the above rule, it is apparent that because both Mr. Portman and Mr. Rimmel represent Ms. Rimell in the instant case, neither would be

able to pursue his pecuniary remedies as a petitioning creditor without also breaching his duty to his client. Such action would create an impermissible conflict of interest between attorney and client. Therefore, neither shall be counted as Ms. Rimell's creditors.

A different issue concerns Messrs. Freyman, Berg, and Slonim-- none of whom currently represent Ms. Rimell. The Creditors argue that these three attorneys should be excluded from the section 303 (b) (2) counting of creditors because each of them have testified to their continuing and unbreachable attorney/client relationship with Harriet Rimell. In essence, the Creditors' proposed rule would exclude per se any attorney who had represented the debtor in any prior matter, regardless of whether it was in any way related to the pending involuntary bankruptcy. This Court believes

that such an exclusionary rule is both overbroad and unwarranted. While an attorney representing the debtor in the involuntary proceeding obviously would be called upon to take a position adverse to that of his client, the same cannot be said for a former attorney. In the latter scenario, the attorney is free to pursue the collection of his fees as would any other creditor. Thus, this Court holds that for purposes of section (b) (2) of the Bankruptcy Code an attorney who represented the debtor in a prior, unrelated matter may not be excluded per se from being counted as a creditor of the alleged debtor. Given this rule, it follows that Mr. Freyman, Mr. Slonim, and Mr. Berg will be counted as creditors.

B. Creditors of the Rimell Family Trust

The remaining eleven creditors[1] of the involuntary petition by the Rimell Family Trust, which, according to Ms. Rimell's testimony, derived its income solely from her paycheck deposits. The Creditors argue that all post-petition payments from the Trust made on pre-petition debt are excludable under section 303(b) (2) of the Bankruptcy Code. Section 303(b) (2) states:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under Chapter 7 or 11 of this title--
> ....
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such

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[1] This group included Tiffany Marble Company, Rollins Protective Service, Delmar Financial Company, CenCom of Missouri, Lawnicure Lawn Service, Union Electric, Laclede Gas Company, Central Hardware, Schneider Service Company, Mastercard, and Famous Barr.

> person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

Thus, the above language creates a checklist of creditors who may not be counted in determining whether the debtor has a sufficient number of creditors to place them in involuntary bankruptcy proceedings. Given the prior discussion of insiders and the inapplicability of the "employee" category to the instant case, the remainder of the discussion will focus on those enumerated Code sections which are applicable to this case.

The Creditors argue that certain creditors which Ms. Rimell listed should be excluded because they received post-petition transfers in violation of section 549(a). This Section states that:

(a) Except as provided in subsection (b)[2] or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under this title;

or

(B) that is not authorized under this title or by the court.

The essence of this language, and a major focus of the Creditors' argument, is that a debtor may not, after the filing of the involuntary petition, pay pre-petition debts with money that was earned pre-petition. Ms.

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[2] Subsection (b) of section 549 states:

(b) In an involuntary case, a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

Subsection (c) of section 549 is inapplicable to the instant case.

Rimell claims that she never made any such transfers. Instead, she argues that the post-petition transfers either were made by a third party-- the Rimell Family Trust, or from Ms. Rimell's post-petition earnings. Therefore Ms. Rimell argues that these creditors should be included in the counting of her section 303 creditors. The petitioning Creditors argue that Ms. Rimell's claim is untenable for two reasons. First, the Trust does not constitute a legitimate third person from which a transfer could be made. Second, Ms. Rimell failed to carry her burden of proving that any post-petition transfers were made from her post-petition earnings.

A. Transfers From The Rimell Family Trust

Created on January 3, 1989, the Rimell Family Trust is revocable at any time. From its inception, Harriet and Albert Rimell

served as co-trustees. The Trust, which held as its sole asset the Rimell residence,[3]

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[3] Ms. Rimell testified that at approximately the same time as the Trust was formed, the Trust entered into a loan for $100,000, using the Rimell residence as collateral. Of this sum, Ms. Rimell distributed the funds as follows: approximately $25,000 to pay off an existing debt on the house, between $10,000 and $20,000 for house renovation, and the remainder of the funds in equal proportions to her three children for no consideration. Ms. Rimell testified that the main intent of the latter distribution was to provide for the medical care of her grandchild.

This is not the only transaction involving the alleged debtors which the Court finds suspect. First, on his June 1, 1988 personal financial statement, Albert Rimell stated to First Bank that he held cash in excess of $233,000, and government securities in excess of $17,000. In a separate financial statement, dated May 12, 1989, Mr. Rimell stated that he had cash and government securities totaling only $2,100. Second, within a year preceding the filing of the involuntary petition in the instant case, Mr. and Mr. Margulis conveyed their residence to LaRosa Enterprises, Inc., a Debtor-affiliated entity, for no consideration. Third, Morris Sherman Conveyed six parcels of real estate for no consideration to Camelot Realty, Inc., a debtor-related corporation.

The Court hardly finds these transfers of cash and real estate coincidental. Rather, it appears to the Court that the alleged Debtors, in an effort to frustrate

supposedly derived all of its income from the paychecks of Harriet Rimell. Ms. Rimell testified that she deposited all of her earnings in the Trust account, save for some cash withdrawals made at the time of the deposit.

This Court believes that the Trust, rather than constituting a "third person", is merely a synonym and an alternative guise for Albert and Harriet Rimell. First, Ms. Rimell testified that she used the funds of the trust to pay all bills related to their home. Testimony further showed that Ms. Rimell used Trust funds to pay a great number of personal and family living expenses. When asked why she didn't use a personal account at another bank, her only reasons were that this arrangement was "more convenient"

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the collection efforts of creditors, sought to reduce as much as possible from their personal estates.

and that she was angry with the bank where she held her personal account. Given that Ms. Rimell's paychecks and the interest derived therefrom supposedly were the Trust's sole source of income, and that she used these funds for personal expenses and the upkeep of her home, this Court chooses to adopt the Creditors' view that the Rimell Family Trust served as little more than Harriet Rimell's "personal checking account". Second, it is difficult to ignore the completely intertwined relationship which the Rimells had with the Trust. Ms. Rimell's role as sole contributor of Trust income, the Rimell's presence as co-trustees, and the fact that the only Trust asset was the Rimell family home, all point to the fact that Trust transfers were in no way those of a "third person". In fact, Mr. Rimell himself contradicted the notion of the Trust's independence when he stated: "I consider

Albert and Harriet Rimell and [the] Rimell Family Trust one and the same. Same assets, same vulnerability."

B. Burden of Proving Source of Post-Petition Transfer Funds

Section 549 of the Bankruptcy Code requires that in order to be counted for purposes of section 303, creditors must be paid with funds earned after the filing date of the involuntary petition. Ms. Rimell has claimed that all post-petition transfers to listed creditors were made with post-petition earnings. Given her assertion of the transfers' validity, Rule 6001 of the Bankruptcy Code places upon her the burden of proof. She has failed to carry this burden. During the entire three days of trial, counsel for Ms. Rimell offered no evidence to prove that the funds used to pay creditors post-petition were earned prior to the October 18, 1989 filing of the involuntary

petition. However, this Court is convinced, after the following examination of the evidence submitted, that the transfers were from pre-petition earnings.

In order to determine whether the funds were earned pre-petition, the Court must trace the deposits and debits of the Trust account. In so doing, the Court will use a "first in, first out" methodology. That is, the Court will assume that checks written against the account will reduce the oldest deposits first. The first step in tracing these funds is to determine the balance which existed on October 18, 1989-- the date of the Creditors' involuntary petition filing. The Trust's account statement, dated November 8, 1989, provides that the account held $10,074.41 on October 10, 1989. After subtracting $3,661.94 for checks which cleared between October 11 and October 18, a balance of $6,412.47 remains. Thus, as of

October 18, 1989, the balance of the Trust account was $6,412.47.

Before proceeding to the actual tracing of the funds, the Court wishes to address one other matter relating to the computation of the October 18, 1989 account balance. The November 8, 1989 statement of the Trust account shows deposits of $3,900 on October 19, $2,400 on October 26, and $2,400 on November 1. This Court chooses to exclude all three deposits from the Trust's pre-petition funds for the following reasons. First, the three checks were credited and debited to the account in the same amount on the same day. Prior Trust bank statements had never before reflected such "coincidental" occurrences. Thus, this Court concludes that the coincidental deposits and withdrawals into and out of the Trust were mere "wash" transactions which do not merit consideration. Second, Ms. Rimell testified

that the only funds deposited were from her earnings. However, this Court has difficulty believing this statement when she made consecutive weekly deposits of $3,900, $2,400, and $2,400, each of which greatly exceed her usual $1,250 per week salary.[4] Ms. Rimell never presented any evidence showing the source of this excess funds.

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[4] An examination of the bank statements of the Rimell Family Trust reveals that during the relevant time period Ms. Rimell made the following deposits into the Trust account:

Date	Amount
10/05/89	$5,250.00
10/19/89	$3,900.00
10/26/89	$2,400.00
11/01/89	$2,400.00

The Court notes that October 19, 1989-- two weeks after her previous deposit-- Ms. Rimell deposited $3,900 into the Trust account. This figure exceeds by $1,400 the $2,500 she would have received from two weeks salary. One week later, Ms. Rimell deposited $2,400 into the Trust account-- a sum which exceeds her $1,250 per week salary by $1,150. Finally, Ms. Rimell's second $2,400 deposit, made one week after the first, again exceeds her salary by the same $1,150.

Finally, the deposits were from Rimell Greystone, Inc., one of Mr. Rimell's companies, and the checks from the Trust were issued to another of Mr. Rimell's companies.

Regarding the actual tracing of the funds, the Court begins with a balance of $6,412.47 as of October 18, 1989. From this initial amount the Court subtracts all checks which cleared between October 18 and November 27, 1989-- the clearance date of the last check in payment of Ms. Rimell's pre-petition creditors. After subtracting these amounts, a balance of $2,414.24 in pre-petition funds remains. See Appendix 1 of this Opinion. Because there is money remaining in the Trust's pre-petition balance, it follows that all of Ms. Rimell's creditors were paid with pre-petition funds. Given this pre-petition payment, this Court may not count any of these creditors for purposes of section 303(b) (1)

CONCLUSION

The above analysis reveals that, for purposes of her section 303 creditor counting, Harriet Rimell has the following six creditors-- Pioneer Bank, R.B. Platt Development Co., D & L Plumbing, Inc., Julius Berg, David Freyman, and Arthur Slonim. Because this number is less than eleven (11), this Court holds that Harriet Rimell's defense, based upon an insufficient number of petitioning creditors, fails.

II. The Involuntary Bankruptcy of the Four Remaining Debtors

FACTS

The Creditors made fifteen separate loans to various entities with which the alleged Debtors are associated. Each of these loans was personally guaranteed by various combinations of Debtors. The Creditors claim the each of these loans is currently due and owing, and now seek to

enforce the personal guarantees against each of the alleged Debtors. None of the alleged Debtors disputes the amounts due, the genuineness or the terms of the guarantees, or the effect of their terms. The parties stipulated at trial that the claims of the petitioning creditors exceed $5,000.00 more than the value of any lien of the Debtors securing such claims. However, the alleged Debtors maintain that each of the petitioners' loans is subject to a bona fide dispute which would preclude the counting of those creditors for purposes of section 303(b) (1).[5] More specifically, the alleged

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[5] In addition to claiming that there exists a bona fide dispute as to the debts, the Debtors also asserted in their Answers the following affirmative defenses, on which they presented no evidence at trial: 1) No final judgment has been rendered in the Creditors' lawsuits (alleging similar claims) filed against the Debtors in the Circuit Court of St. Louis County; 2) Debtors are paying all of their just and proper debts as they mature; 3) The Creditors have filed their Petitions in bad faith and have

Debtors claim that the loans are not yet due because each of the four Creditors agreed at the time of each loan transaction that, upon Mr. Rimell's request, they would extend the terms of the loan, lower the current rate of interest on the loan, or amend the loans to provide terms more favorable to the alleged Debtors.[6] In sum, the alleged Debtors contend that the four Creditors promised, at the time of each initial loan transaction, that they would, if requested, continually extend the loan until the alleged Debtors had

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prosecuted this proceeding with malice and without probable cause; and 4) The failure of the Creditors to fulfill and perform the commitments and obligations owed to the Debtors regarding the loans in controversy estops the Creditors from obtaining the relief sought in their Petition. The Court considers these defenses abandoned.

[6] Alleged Debtor Albert Rimell testified that each of the Creditors basically agreed that he could request these amendments as he wished, provided such request were reasonable.

sold the respective property which collateralized the loans.[7]

The alleged Debtors offered no documentary evidence reflecting or embodying the alleged agreement. However, the alleged Debtors have offered two theories which evidence their agreements with the Creditors. First, they claim that the parties at each loan transaction made an express oral agreement that the Creditor would not call the loan if it came due before the property was sold. All loan officers taking part in each of the transactions have denied ever entering into such agreements. Second, the alleged Debtors maintain, in the alternative,

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[7] Mr. Rimell testified that the Creditors were well aware at the time of each loan transaction that Mr. Rimell and his partners were seeking to purchase real estate for speculative purposes. That is, the Creditors knew that the loans could not be paid off until the real estate had been sold. Thus, Mr. Rimell claims that the Creditors' promises not to call the loans when they came due were logical, foreseeable occurrences.

that the agreements are evidenced by the parties' prior course of dealing. In short, the alleged Debtors claim that because the Creditors had refused to call prior loans as the became due, this Court should infer that the parties reached a similar agreement in the instant case.[8]

DISCUSSION

Section 303(b) (1) of the Bankruptcy Code states:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under Chapter 7 or 11 of this title--
>
> > (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such holder, if such claims aggregate at least $5,000 more than the value of any lien on

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[8] Testimony at trial reflects the fact that while Mercantile never extended any of its loans with the Debtor-affiliated partnerships, it did refinance some of these loans. This Court chooses to treat these actions as one and the same.

> property of the debtor securing such claims held by the holders of such claims; (emphasis added)

Thus, if there is a bona fide dispute as to the debtor's liability, section 303(b) (1) precludes the court from counting that creditor for purposes of the involuntary proceeding. In the instant case, the Debtors claim that the bona fide dispute as to when each of their loans is due precludes this Court from counting any of the Creditors in this section 303 proceeding. Thus, if the alleged Debtors' assertion is correct, the Creditors' efforts to place them in involuntary bankruptcy must fail. As in the previous issue involving Harriet Rimell, it is the alleged debtors who bear the burden of proving that such a bona fide dispute exists. In re Einhorn, 59 B.R. 179, 185 (Bankr. E.D.N.Y. 1986) (once debts are established, debtor bears burden of proving otherwise).

This Court finds that for purposes of section 303(b) (1) the alleged Debtors have failed to offer sufficient evidence to raise this controversy over contractual terms to the level of a bona fide dispute. In short, this Court concludes that because no agreement existed such as that asserted by the alleged Debtors, there could be no bona fide dispute over the terms of the "agreement".

A. Express Oral Agreement

Albert Rimell testified that each Creditor orally agreed, at the time of the loan transaction, that it should extend the terms of the loan, lower the rate of interest, or amend the loan with terms more favorable to the alleged Debtors. While this Court has little doubt that Mr. Rimell may have made such requests, there is no evidence to confirm that the parties ever <u>agreed</u> to such terms. First, all four of the bank

representatives denied, under oath, that they ever agreed to such terms. Second, the alleged Debtors have failed to offer one piece of documentary which reflects the terms of the agreements which they assert, including any notes of such agreements. Thus, this Court concludes that, contrary to the alleged Debtors' assertions, the parties in this case never orally agreed to extend, modify, or alter the existing written terms of the loans. Therefore there could be no "bona fide dispute" as to the terms of the agreement as none ever existed.

B. Course of Dealing

The alleged Debtors also contend that because the Creditors had refused to call prior loans as they became due, this Court should infer from this prior course of dealing that an extension of loan terms took place in the instant case. This Court,

however, does not believe that prior loan transactions between parties are sufficient to constitute a "course of dealing", as the same might be understood in general contract law. Instead, given that each prior loan had differing and unique terms, this Court chooses to treat each loan transaction as a separate independent agreement. Thus, by definition there could be no prior course of dealing from which this Court could infer that the parties agreed in advance to the terms of future borrowings which the alleged Debtors assert in the instant case.

CONCLUSION

This Court has concluded that the parties did not, either orally or through prior course of dealing, agree to alter, extend, or modify the existing written contractual terms on any of the loans in the instant case. Given that the parties did not agree to such terms, it follows that there

could be no bona fide dispute. Similarly, in the case of Harriet Rimell, an examination of all creditors revealed that the requisite number of petitioning creditors exist. Accordingly, it is

ORDERED that, pursuant to section 303 of the Bankruptcy Code, an Order for relief under Title 11, Chapter 7 is hereby entered against Harriet Rimell, Albert Rimell, Rosalyn Margulis, Lawrence Margulis, and Morris Sherman.

APPENDIX OMITTED

/s/ Barry S. Schermer
Barry S. Schermer
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

In re

ALBERT RIMELL,	Case No. 89-04383-BSS
HARRIET RIMELL,	Case No. 89-04382-BSS
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Debtors

Decided March 7, 1990

MEMORANDUM OPINION AND ORDER

INTRODUCTION

On February 15, 1990, Debtors Harriet and Albert Rimell, Morris Sherman, and Rosalyn and Lawrence Margulis (hereinafter the "Debtors") filed a Motion to Set Aside and Vacate the Memorandum, Order, and Opinion Entered on February 5, 1990 (hereinafter the "Motion"). Debtor Harriet Rimell alleges that this Court failed to count certain of her creditors, the addition of which would preclude her placement in involuntary bankruptcy. The remaining Debtors join Ms. Rimell in arguing that this Court erroneously

determined, based in part on inconsistent testimony, that no bona fide dispute existed between the Debtors and the petitioning creditors regarding the renewal and extension of various loans.

JURISDICTION

This court has jurisdiction over the subject matter of the proceeding pursuant to 28 U.S.C. sections 151, 157, 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" which the Court may hear and determine pursuant to 28 U.S.C. section 157(2) (O),

DISCUSSION

Rule 59 of the Federal Rules of Civil Procedure, which is incorporated into the Bankruptcy Code by Bankruptcy Rule 9023, allows a party to file a motion requesting a new trial and an amendment of the prior judgment. In Hagerman v. Yukon Energy Corp.,

839 F.2d 407, 414 (8th Cir.), cert. denied, 109 S. Ct. 63 (1988), the Eighth Circuit quoted with approval the following statement from Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987), as amended, 835 F.2d 710 (7th Cir. 1987):

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce evidence that could have been adduced during pendency of the [trial] .... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Thus, a court may only grant a motion for reconsideration when the movant either 1) produces evidence that they could not have introduced at the previous hearing, or 2) presents legal or factual errors that existed in the previous ruling. This Court concludes that the Debtors have failed to meet either of these two requirements.

I. The Counting of Harriet Rimell's Creditors

Ms. Rimell first alleges that this Court erred in failing to count seven co-guarantors of the First Bank claim and two co-guarantors of the Mark Twain Bank (hereinafter "Mark Twain") loans, as both banks have now filed suit to collect on the guarantees. However, this Court need not reach the merits of this contention as none of these parties was listed as a creditor of Ms. Rimell prior to trial. This fact is conceded by the Debtors in their accompanying Memorandum, which states that:

> [a]lthough the foregoing facts were not specifically called to the attention of the Court at the hearing, these creditors appear in the documents submitted by petitioning creditors.[1]

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[1] The Court notes that in a case containing approximately one hundred exhibits, Debtor's counsel failed to direct the Court's attention to any document to which he referred.

This Court does not believe that it is charged with the duty of inferring the existence of creditors which the debtor is specifically required to list. See Bankruptcy Rule 1007(a) (2). In addition, counsel for Ms. Rimell have never proffered evidence which would excuse the omission of these creditors from her list. Thus, this Court cannot include these parties in Ms. Rimell's section 303 (b) (2) creditor count.

Ms. Rimell also believes that this Court's improper denial of her motion to include St. Louis County as a creditor on the trial now mandates its inclusion. This Court, however, stands firm in its belief that to allow the inclusion of creditors literally minutes before trial completely fails to give opposing parties the adequate notice to which they are entitled under Rule 1003(b) of the Bankruptcy Code. Thus, St.

Louis County may not be included in Ms. Rimell's counting of creditors.

Ms. Rimell also attached to her Motion a letter, dated December 7, 1989, sent by a Famous-Barr credit manager to opposing counsel. Ms. Rimell claims that because the letter's contents reflect the fact that an outstanding balance existed on the date of filing, this Court should add Famous-Barr to her list of section 303(b) (2) creditors. This contention, however, contains several flaws. First, Ms. Rimell never originally listed Famous-Barr as one of her creditors, and has failed to offer any evidence which would excuse such an omission. The only evidence which this Court heard regarding Famous-Barr was that it received payment from the Rimell Family Trust with pre-petition funds, which this Court found excluded this Creditor from being counted. Second, even if Ms. Rimell had properly listed Famous-Barr as

a creditor, the letter from Famous-Barr's credit manager does not establish Ms. Rimell's liability for the debt. Thus, this Court declines to include Famous-Barr in the counting of her creditors.

Finally, Ms. Rimell contends that this Court should have counted the petitioning creditors, First Bank and Mark Twain. Although Ms. Rimell never specifically listed these creditors (see debtor's list of creditors filed pursuant to Rule 1007), this Court believes that they rightfully should be counted as section 303(b) (2) creditors. Yet even with the addition of these two creditors, Ms. Rimell's creditor count only rises to eight. Thus, because Ms. Rimell has not established that she has eleven or more creditors, the order for relief was properly entered.

II. Issues Pertaining to All Five Debtors

In Matter of Busick, 831 F.2d 745 (7th Cir. 1987), the Seventh Circuit, reviewing the court's definition of "bona fide dispute" in In re Lough, 57 B.R. (E.D. Mich. 1986), stated:

> We agree with the district court that the standard employed by the court in Lough is the formulation most compatible with the Congressional intent.[footnote omitted] Under that standard, "if there is a bona fide dispute as to either the law or the facts, then the creditor does not qualify and the petition must be dismissed." Lough, 57 B.R. at 997; see In re Garland Coal & Mining Co., Lough standard). Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. However, "[t]he statute does not require the court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary." Busick, 65 B.R. at 637.
>
> 831 F.2d at 749-50.

Thus, courts facing this issue utilize an objective standard which requires them to answer only one question: does a bona fide dispute exits in the instant case?

The Debtors allege that this Court erred in ruling that none of the loans in question were subject to a bona fide dispute (thus precluding the counting of these creditors for purposes of section 303(b) (1). More specifically, the debtors contend that 1) the Court's ruling was based in part on "erroneous testimony", and 2) the Court erroneously determined the merits of the "bona fide disputes" rather than determining whether such disputes existed. In support of the contention that inconsistent testimony was presented at trial, the Debtors have proffered a letter, dated September 14, 1987, which John D. Haffenreffer, Vice President of Centerre Bank, sent to Albert Rimell. In the letter, Mr. Haffenreffer requests that Mr.

Rimell remit payment to a local law firm "for services rendered and expenses advanced on behalf of Centerre in connection with renewals and modification of loans to Albert Rimell, Inc. and related entities and individuals". The Debtors contend that the text of this letter contradicts Mr. Haffenreffer's prior testimony, in which he denied ever having promised that he would allow the Debtors to alter, amend, or modify the terms of existing loans.[2] The Debtors further assert that the conflict in testimony between Albert Rimell and the officers of each bank proves the existence of a bona fide dispute.

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[2] The Court notes that the Debtors have offered no reason why this document was not produced at trial, only that it was "discovered after the hearing by a former secretary of Albert Rimell".

The Debtors contend that certain bank officers promised to continually renew or alter the terms of various loans, subject to the reasonable request of Albert Rimell. According to the Debtors, the bona fide dispute focuses on when the loans are due rather than the amount due. Thus, because the banks failed to renew or extend the loans as promised, the Debtors argue that the debt on these loans is not yet due. The letter proffered by the Debtors refers to the renewal or modification of loans between Centerre and various Debtor-related entities, but neither its text nor the accompanying law firm time sheets refers to a specific loan. Certainly one cannot conclude, simply by examining either one of these documents, that any modifications or renewals necessarily concerned any of the loans in the instant case. Thus, this Court must assume that the Debtors have offered this evidence to

establish the existence of a course of dealing between the parties in which Centerre would renew or extend the terms of existing loans upon Albert Rimell's request.

This Court concludes that the evidence proffered does not establish the existence of a general agreement between the parties to renew or modify all loans upon request.[3] Under Busick, a Court need only look objectively at the evidence presented to determine whether a bona fide dispute existed. Upon reviewing the evidence, this Court cannot determine, using an objective standard, that a bona fide dispute existed because neither the newly submitted evidence nor any of the Debtors' evidence proves the existence of an agreement to renew or modify

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[3] In addition, this Court ruled, and continues to believe that the refusal to call prior loans does not constitute a course of dealing, as each loan transaction was a separate, independent agreement.

the terms of loans between the parties. However, even if the recently submitted documents were dispositive of such an agreement, this would pertain only to Centerre (now Boatmen's), and the requisite three petitioning creditors-- First Bank, Mark Twain, and Mercantile Bank National Association-- would remain.

In sum, the Debtors failed to establish the existence of an express agreement allowing Mr. Rimell to initiate unilaterally a loan renewal or extension. Nor did they proffer evidence to support their assertion that past loan modifications or renewals were triggered by Mr. Rimell's unilateral request. Rather, the evidence supports the petitioning creditors' contention that prior loan renewals or modifications were the result of mutual agreement. Thus, viewed objectively, as a matter of law and fact this Court concludes that no bona fide dispute existed

as to when the loans were due because none of the loans was renewed or modified upon Mr. Rimell's unilateral request. Therefore, having reviewed the Debtors; additional evidence, this Court continues to believe that its order granting relief was proper. Accordingly, it is

ORDERED that the requisite number of creditors existed to place Harriet Rimell in involuntary bankruptcy, no bona fide dispute existed as to the terms of the loans in the instant case, and the Debtors' Motion to Set Aside and Vacate the Memorandum and Opinion Entered on February 5, 1990 is DENIED.

/S/ Barry S. Schermer
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:

HARRIET RIMELL,
Debtor.
HARRIET RIMELL,
Appellant, No. 90-804-C

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees.

In Re:

ALBERT RIMELL,
Debtor,
ALBERT RIMELL,
Appellant, No. 90-805-C

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees.

ORDER

In accordance with the memorandum filed herein this day, the Judgement and Order of the Bankruptcy Court in the above styled cases is **AFFIRMED.**

Dated this 15th day of November, 1990.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:
HARRIET RIMELL,
Debtor.
HARRIET RIMELL,
Appellant, No. 90-804-C (5)

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees

In Re:
ALBERT RIMELL,
Debtor,
ALBERT RIMELL,
Appellant, No. 90-805-C (2)

vs.

MARK TWAIN BANK and FIRST BANK,
Appellees. November 15, 1990

MEMORANDUM

I. Introduction

This matter is before the Court on appeal from orders for relief entered against Harriet Rimell and Albert Rimell by the United States Bankruptcy Court for the

Eastern District of Missouri. This Court has jurisdiction to hear this appeal under 28 U.S.C. section 1334. By motion of appellees, the Court consolidated for appeal the causes of Harriet Rimell and Albert Rimell.

II. Issues Presented

The issues on appeal are 1) whether the debts allegedly owed to the petitioning creditors were subject to a bona fide dispute, disqualifying creditors from bringing an involuntary petition under 11 U.S.C. section 303; and, 2) whether the Bankruptcy Court properly determined that Harriet Rimell had fewer than twelve creditors, permitting only two creditors to bring an involuntary petition against her under 11 U.S.C. section 303(b) (2)/

III. Standard of Review

This court must affirm the decision of the Bankruptcy Court if it is supported by law and the facts contained in the record.

The Bankruptcy Court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses. In re Martin, 761 F.2d 472, 474 (8th Cir. 1985). Under Bankruptcy Rule 8013, findings of fact are clearly erroneous when they are not supported by substantial evidence, contrary to the clear preponderance of the evidence, or based on an erroneous view of the law. In re Cook, 72 Bankr. 976 (W.D.Mo. 1987). Conclusions of law are subject to de novo review. In re Martin, 761 F.2d at 474.

IV. Procedural Posture

On October 18, 1989, Mark Twain Bank and First Bank ("petitioning creditors:) filed separate involuntary bankruptcy petitions against Harriet Rimell and Albert Rimell ("debtors"). This was one of a series of actions in which Mark Twain and First Bank,

along with two other banks, filed involuntary Chapter 7 petitions against Albert Rimell and Harriet Rimell. The Rimells, along with three others,[1] engaged in certain loan transactions for real estate speculation. The debtors claimed as an affirmative defense that the debts allegedly owed were subject to a bona fide dispute, disqualifying those creditors from bringing an involuntary petition against them under 11 U.S.C. section 303.

Harriet Rimell also claimed that she had twelve or more creditors, thus the Bankruptcy Court lacked subject matter jurisdiction under 11 U.S.C. section 303 (b) (1) in that only two creditors joined the involuntary

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[1] The Bankruptcy Court consolidated for trial the cases of Harriet Rimell, Albert Rimell and the three others. Only the appeals of Harriet Rimell and Albert Rimell are before this Court.

petition.[2] The Bankruptcy Court held a consolidated trial and entered its order for relief in both cases on February 5, 1990. Both debtors now appeal that judgment.

V. Bona Fide Dispute Issue

A. Facts

The Bankruptcy Court made the following findings of fact. The creditors made fifteen separate loans to various entities with which the debtors are associated. Each of these loans was personally guaranteed by the debtor or their business associates. The debtors do not dispute the amounts due, the genuineness or the terms of the guarantees, or the effect of the terms. The debtors claim, however, that the loans are not yet due because each of the creditors agreed at the time of each

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[2] Section 303(b) (1) requires three petitioning creditors. However, when there are fewer than twelve creditors, section 303(b) (2) would allow only two petitioning creditors.

loan transaction that, upon Mr. Rimell's request, they would extend the terms of the loan, lower the current rate of interest on the loan, or amend the loans to provide terms more favorable to the debtors. The debtors contend that the creditors promised, at the time of each initial loan transaction, that they would, if requested, continually extend the loans until the alleged debtors had sold the respective property which collateralized the loans.

The debtors offered no documentary evidence of these alleged agreements. They claimed first that each of the loans officers made express oral agreements that the creditor would not call the loan if it came due before the property was sold. All loan officers taking part in the transactions denied ever entering into such agreements. The debtors failed to offer sufficient evidence to raise the controversy over

contractual terms to the level of a bona fide dispute.

The Bankruptcy Court found that the parties never orally agreed to extend, modify, or alter the existing written terms of the loans. "[T]his Court concludes that because no agreement existed such as that asserted by the alleged Debtors, there could be no bona fide dispute over the terms of the 'agreement'". In Re: Rimell, No. 89-043282-BSS, Memorandum Opinion and Order at 20-21 (Bankr.E.D.Mo. Feb. 5, 1990).

The debtors also asserted that the agreements are evidenced by the parties' prior course of dealing. They contended that because the creditors refused to call prior loans as they became due, there was an extension of loan terms in this case also. The Bankruptcy Court found that each prior loan had differing and unique terms and was therefore a separate, independent agreement.

It found that the prior loan trans actions between the parties were not sufficient to constitute a "course of dealing." In Re: Rimell, No. 89-04382-BSS, Memorandum Opinion and Order at 22-23 (Bankr.E.D.Mo. Feb. 5, 1990).

B. Applicable law

Section 303(b) (1) of the Bankruptcy Code provides:

> (b) An involuntary case against a person is commenced by the filing with the Bankruptcy Court of a petition under Chapter 7 or 11 of this Title--
>
> (1) By three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture

trustee representing such a holder

. . .

11 U.S.C. section 303(b) (1) (emphasis added). If a bona fide dispute exists as to the debtor's liability, section 303(b) (1) precludes the court from counting that creditor for purposes of the involuntary proceeding. The alleged debtors bear the burden of proving that a bona fide dispute exists. In re Einhorn, 59 Bankr. 179, 185 (E.D.N.Y. 1986).

The statute does not define "bona fide dispute." Bankruptcy courts have used various formulations of the standard. See, e.g., in re Lough, 57 Bankr. 993 (E.D.Mich. 1986); In re Stroop, 51 Bankr. 210 (D.Colo. 1985); In re Johnston Hawks, Ltd., 49 Bankr. 823 (D.Haw. 1985). The Seventh Circuit surveyed the various approaches and determined that the standard employed by the court in Lough is the most compatible with

Congressional intent. Matter of Busick, 831 F.2d 745, 749 (7th Cir. 1987). See also In re Garland Coal & Mining Co., 67 Bankr. 514 (W.D.Ark. 1986) (adopting the Lough standard).

This Court also adopts the Lough standard, under which the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. Busick, 831 F.2d at 750.

C. Conclusion

This Court finds that the Bankruptcy Court's findings of fact are not clearly erroneous. Thus, the Court holds that based on the applicable law that the claims creditors held against debtors were not subject to a bona fide dispute. Therefore, creditors are entitled to relief pursuant Title 11, Chapter 7 of the Bankruptcy Code.

VI. Number of Creditors Issue

A. Facts

Ms. Rimell listed a total of twenty-two creditors. The Bankruptcy Court found that as of the date of filing Ms. Rimell owed debts to only eight creditors. The two petitioning creditors plus six others[3] held claims against her. In reaching this decision, the Bankruptcy Court excluded sixteen of the twenty-four listed creditors because: 1) three did not held claims against Ms. Rimell as of the filing date; 2) two were "insiders: of Ms. Rimell; and 3) eleven received unauthorized post-petition payment of their prepetition claims.

B Applicable law

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[3] Pioneer Bank & Trust Co. ("Pioneer") was one of the creditors the Bankruptcy Court found had a claim against Ms. Rimell. Pioneer since has been added as a petitioning creditor.

Any creditor holding an unsecured claim that is not contingent may join in the petition after the filing but before the case is dismissed or relief is ordered. 11 U.S.C. 303(c). The effect is the same as if such joining creditor were a petitioning creditor. The Bankruptcy Court found that Pioneer Bank & Trust Co. ("Pioneer") was a creditor holding a claim against Harriet Rimell. In Re: Rimell, No. 89-04382-BSS, Memorandum Opinion and Order at 5 (Bankr.E.D.Mo. Feb. 5, 1990). After this case was appealed to this Court, Pioneer moved to join as a petitioning creditor under 11 U.S.C. section 303(c). Debtors did not oppose Pioneer's motion to join as a petitioning creditor and this Court granted that motion. Order at 2 (July 16, 1990).

C. Conclusion

The effect of Pioneer's joinder as a petitioning creditor is to bring the number

of petitioning creditors against Harriet Rimell to three. Therefore, the issue of whether Harriet Rimell had fewer than twelve creditors, permitting only two creditors to bring an involuntary petition against her is moot.

Additionally, this Court finds that the findings of the Bankruptcy Court were supported by the facts and the law. Thus, even if Pioneer had not joined as a petitioning creditor, the decision of the Bankruptcy Court would be affirmed.

Accordingly, for the foregoing reasons the Judgment and Order of the Bankruptcy in the above styled actions will be affirmed.

Dated this 15th day of November, 1990.

/S/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-3054EM

In re: Harriet Rimell, Debtor.

Harriet Rimell,
Appellant,

v.

Mark Twain Bank; First Bank;
and Pioneer Bank,
Appellees.

* * * Appeal from the United States District Court for the Eastern District of Missouri.

In re: Albert Rimell, Debtor

Albert Rimell,
Appellant,

v.

Mark Twain Bank; First Bank;
and Mercantile Bank, N.A.

Submitted: September 10, 1991

Filed: October 15, 1991

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Albert and Harriet Rimell appeal the district court's affirmance of orders made by the bankruptcy court.[1] We affirm the district court[2] in all respects.

I. BACKGROUND

Mark Twain Bank and First Bank filed involuntary bankruptcy petitions against Harriet Rimell. These two banks, along with two additional banks, also joined in involuntary bankruptcy petitions against

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[1] The Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri. Judge Schermer's opinion is reported as In re Rimell, 111 B.R. 250 (Bankr. E.D. Mo. 1990).

[2] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri. Judge Limbaugh's decision is reported as In re Rimell, 121 B.R. 253 (E.D. Mo. 1990)

Albert Rimell and three other individuals.[3] The petitions were based on loans the banks made to various entities with which the debtors were associated. At least one of the five debtors personally guarantied each of the loans.

The petitions were consolidated into one proceeding before the bankruptcy court. The debtors argued that the banks could not institute involuntary proceedings because the loans were subject to a bona fide dispute. More specifically, the debtors argued the loans were not due because the banks had orally agreed that, upon Albert Rimell's request, the terms of the loans would be modified in a variety of ways to allow the debtors more time to repay their obligations.

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[3] The other three debtors did not appeal the bankruptcy court's orders to the district court and are not parties to this appeal. For ease of discussion, the quintet will be referred to collectively as "the debtors."

Harriet Rimell, in addition to joining in this argument, also asserted that because she had more than twelve creditors, the Bankruptcy Code (hereinafter "the Code") required at least three creditors to petition for her forced entrance into bankruptcy.

The bankruptcy court determined there was insufficient evidence to show that the parties ever agreed that the terms would be automatically modified upon Albert Rimell's request. Rimell, 111 B.R. at 258-59. In counting Harriet Rimell's creditors, the bankruptcy court ultimately held that she had eight creditors; it rejected the remaining sixteen proffered creditors because, in the words of the district court, "1) three did not hold claims against Ms. Rimell as of the filing date; 2) two were 'insiders' of Ms. Rimell; and 3) eleven received unauthorized post-petition payment of their prepetition claims." Rimell, 121 B.R. at 257.

The Rimell's appealed to district court; at some time prior to the district court's decision, Pioneer Bank joined the involuntary petition against Harriet Rimell. The district court affirmed the bankruptcy court's decision that the loans were not subject to a bona fide dispute and further determined that the number of Harriet Rimell's creditors was moot because Pioneer Bank joined the petition as the third creditor.

II. DISCUSSION

A. The Existence of a Bona Fide Dispute

The Code allows an involuntary case to be commenced when three or more entities holding claims against the debtor file a petition so long as those claims are "not contingent as to liability or the subject of a bona fide dispute." 11 U.S.C. section 303(b) (1) (1988). The Code does not define

a "bona fide dispute" and thereby leaves the term's meaning to judicial determination.

This circuit has never had occasion to define the term. Our efforts to do so on this occasion are guided by the prior efforts of other circuits. We note that the three circuits that have addressed this issue have been heavily persuaded by the reasoning contained In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986), and have adopted substantially similar tests for determining the existence of a bona fide dispute. Both the Seventh and the Tenth Circuits have stated that the proper standard requires the bankruptcy court to "determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt." Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987); Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1544 (10th Cir. 1988) (quoting Busick). The Third Circuit, relying

on the Seventh Circuit's decision in Busick, has indicated that a bona fide dispute exists if there are "'substantial' factual and legal questions raised by the debtor" bearing upon the debtor's liability. B.D.W. Assoc. v. Busy Beaver Building Center, Inc., 865 F.2d 65, 66-67 (3d Cir. 1989) (citing Busick, 831 F.2d at 750). Because we agree with the Seventh Circuit that this approach best effectuates Congress' intent, see Busick, 831 F.2d at 749, we also adopt this objective inquiry to determine whether a bona fide dispute exists.

In applying this standard, the petitioning creditor must establish a prima facie case that no bona fide dispute exits. Once this is done, the burden shifts to the debtor to present evidence demonstrating that a bona fide dispute does exist. Bartmann, 853 F.2d at 1544. Because the standard is objective, neither the debtor's subjective

intent nor his subjective belief is sufficient to meet this burden. Id. The court's objective is to ascertain whether a dispute that is bona fide exists; the court is not to actually resolve the dispute. Id. This does not mean that the bankruptcy court is totally prohibited from addressing the legal merits of the alleged dispute; indeed, the bankruptcy court may be required to conduct a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exits. Busick, 831 F.2d at 750. Finally, because the determination as to whether a dispute is bona fide will often depend (as it did in this case) upon an assessment of witnesses' credibilities and other factual considerations, the bankruptcy court's determination in this regard is a factual finding that may be overturned on appeal only

if it is clearly erroneous. See Bankruptcy Rule 8013.

In the case at bar, the bankruptcy court conducted the inquiry we now hold to be appropriate. Specifically, the bankruptcy court examined the loan documents proffered by the banks and noted that the parties did not dispute "the amounts due, the genuiness or the terms of the guarantees, or the effect of their terms." Rimell, 111 B.R. at 257. The court then afforded the debtors an opportunity to present evidence that there was an additional, oral agreement that allowed the debtors to change the loans' terms at will in order to facilitate payment. After reviewing the evidence, the bankruptcy court concluded that "the parties did not, either orally or through prior course of dealing agree to alter, extend or modify the existing written contractual terms on any of the loans in the instant case. Given that

the parties did not agree to such terms, it follows that there could be no bona fide dispute." Id. at 259. We have reviewed the record and do not believe the bankruptcy court's findings are clearly erroneous; hence, we affirm the determination that the banks' claims were not subject to a bona fide dispute.

B. The Counting of Harriet Rimell's Creditors.

Although an involuntary case generally requires three or more creditors to joint the petition, the Code requires only one creditor to request involuntary proceedings if the debtor has less than twelve creditors. 11 U.S.C. section 303(b) (2) (1988). It does not appear that the bankruptcy court erred in classifying Harriet Rimell's creditors and concluding that she had less than twelve creditors; however, we do not address this issue in detail because we agree with the

district court that Pioneer Bank's joinder in the petition renders this issue moot.

The Code specifies that "a creditor holding an unsecured claim that is not contingent . . .may join in the petition with the same effect as if such joining creditor were a petitioning creditor. . ." Id. section 303(c). The joining creditor must not have been an original party to the petition and the joinder must take place before "the case is dismissed or relief is ordered." Id.

Pioneer Bank joined the petition filed by Mark Twain Bank and First Bank within the time required by section 303(c). Therefore, Pioneer Bank is to be treated as if it had joined the petition ab initio, thereby increasing the effective number of petitioning creditors to three. Consequently, it no longer matter how many creditors were needed to join the petition. 2

Collier on Bankruptcy section 303.33 (15th ed. 1979).

III. Conclusion

The bankruptcy court's determination that the banks' claims were not subject to a bona fide dispute was not clearly erroneous. The number of Harriet Rimell's Creditors is moot due to Pioneer Bank's joinder in the involuntary petition originally filed by First Bank and Mark Twain Bank. Consequently, we affirm the district court's affirmance of the bankruptcy court's decisions on these matters.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-3054EMSL

In Re: Harriet Rimell, Debtor

Harriet Rimell,
Appellant,

vs.

Mark Twain Bank; First Bank; and Pioneer Bank,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

* * * * * * * * * * *

In Re: Albert Rimell, Debtor

Albert Rimell,
Appellant,

vs.

Mark Twain Bank; First Bank; and Mercantile Bank, N.A.

Appellants' petition for rehearing has been considered by the court and is denied.

December 3, 1991

Order Entered at the Direction of the Court:

/S/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit.

SUPREME COURT of the UNITED STATES

No.

A-618

Harriet Rimell, et vir,

Petitioners

v.

Mark Twain Bank, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including 1 April, 1992.

/S/ Harry A. Blackmun
Associate Justice of the Supreme Court of the Untied States

Dated tnis 25th
day of February, 1992

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

Mercantile Bank, N. A.

Plaintiff

VS

Cleveland Arms Apartments, Inc. et al

Defendant

Date: September 5, 1989
Case Number: 586280
Team/Division: B

Plaintiff's motion for summary judgement is overruled.

/S/ Richard Provaznik
Judge/Division

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

Mercantile Bank National Association
Plaintiff

VS

Lawrence Margulis, et al.
Defendant

Date:	January 31, 1989
Case Number:	581471
Team/Division:	B

Plaintiff Mercantile Bank National Association's Motion For Summary Judgment called; heard and denied without prejudice.

/S/ Arthur Litz
Judge/Division

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

Mercantile Bank NA

Plaintiff

VS

Lawrence Margulis, et al.

Defendant

Date:	January 31, 1989
Case Number:	581469
Team/Division:	B

Plaintiff's Motion For Summary Judgment, called heard and dismissed, without prejudice.

/S/ Arthur Litz
Judge/Division

THE CIRCUIT COURT OF ST. LOUIS COUNTY MISSOURI

21st JUDICIAL CIRCUIT

The Boatman's National Bank of St. Louis
Plaintiff

VS

Albert Rimell, Inc. et al
Defendant

Date:	March 5, 1991
Case Number:	598450
Team/Division:	Team B. Div 6

Plaintiff's Motion For Summary Judgement argued, submitted and denied.

/S/ Robert Satz
Judge/Division